Prize Jurisdiction.

ARGUMENT

OF

ISAIAH T. WILLIAMS, ESQ.,

BEFORE

HIS HONOR, JUDGE BETTS,

UPON THE QUESTION

OF THE

JURISDICTION OF THE PRIZE COURT,

IN THE

CASE OF A VESSEL CAPTURED

FOR A

Breach of the Blockade.

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In Admiralty,

BEFORE JUDGE BETTS.

HARLAN, HOLLINGSWORTH, & CO.

against

THE STEAMSHIP NASSAU, &c.

Monday, 22nd September, 1862.

In this case Mr. I. T. WILLIAMS appeared for the Libellants, Messrs. HARLAN, HOLLINGSWORTH, & Co., of Wilmington, Del.

Mr. UPTON for the UNITED STATES; and

Mr. EDWARDS for BRITISH SUBJECTS, claiming as owners.

Mr. EDWARDS now moved that the libellants' suit should be dismissed in the Instance Court, on the ground that the Nassau was the subject of a suit in the Prize Court, the jurisdiction of which superseded that of the Instance Court.

Mr. WILLIAMS, in opposing the motion, said:

MAY IT PLEASE THE COURT:

On the 2d day of June last, the Steamship Nassau was brought into this Port by persons claiming to be a *Prize Crew*, and delivered into the custody of persons known as the "Prize Commissioners" of this District. While she was so in the possession of the Prize Commissioners and on the 17th day of June, aforesaid, the libellants filed their libel in this action claiming a Maritime Lien upon this Vessel for repairs done thereto, at the request of the Captain thereof, in the month of July, 1860, at Wilmington, in the State of Delaware.

The libel sets forth that the Vessel, while upon a voyage upon the high seas and engaged in trade and commerce between ports and places in different states and countries, put into the Port of Wilmington in distress. That she was owned by persons residing in the State of South Carolina, who had no credit in the Port of Wilmington. That application was made to the libellants by the Captain of the Vessel to do such necessary repairs as would enable

her to proceed upon the voyage in which she was then engaged, upon the credit of the Vessel. That the libellants acceded to this request, and did and performed such necessary repairs as the Vessel then stood in need of, relying upon the maritime lien given by the general maritime law, as their security therefor.

On her arrival in this Port the libellants filed their libel upon which process was issued out of this Court to the Marshal of this District, commanding him, in the name of the President of the United States, to arrest the Vessel, and detain her in his custody to abide the decision of the Court in this case.

The Marshal, under this process, arrested the Vessel, and on the same day, (June 17th) made his return to this Court, in substance, that he had, in obedience to the process of this Court, arrested the said Vessel, her tackle, &c., "the same being at the time of the arrest in the custody of the Prize Commissioners."

On the 12th of July, the United States District Attorney for this District filed a libel in the Prize Court in behalf of the Government and captors, claiming the Vessel as *Prize of war*.

On the 29th day of July, the United States District Attorney perfected his appearance in this suit in the Admiralty intervening on behalf of the Government and the "Prize Captors," claiming the Vessel as Prize of war.

On the day of the British Consul perfected his appearance in this suit in the admiralty intervening on the part of the owners of said Vessel, claiming that she is owned by British subjects, and disputing the claim of the Libellants.

Both these parties now move to dismiss the libel so filed by these libellants on the ground that the Vessel having been captured by a Prize crew as Prize of war, it is not competent for a private suitor to interfere with or molest such military possession except through the authority of the Prize Court.

I am therefore required to show good and sufficient cause why this suit, instituted for the purpose of enforcing a claim due to material men, which, under the general maritime law of the United States, constitutes an undoubted lien on the Steamship Nassau, should not be dismissed without a hearing. I am not ignorant, sir, that in thus appearing, I stand on somewhat delicate ground—that I am in danger of being thrust out of court on the strength of an array of textual and judicial authority bearing on the arbitrary question of prize law. I am not deterred, however, by these considerations, for we are not in a Prize Court. We are here in the Instance Court of the Admiralty, and I wish to be informed on what ground that Court refuses me its legitimate jurisdiction.

The claim of Messrs. Harlan, Hollingsworth, & Co., constitutes an indisputable lien on the Vessel by the municipal law of the United States. The Court of Admiralty is the jurisdiction which takes special cognizance of and enforces such liens. We have appealed to that jurisdiction in strict form of law. I am told, however, that a suit of Prize, subsequently instituted, must be held to override the jurisdiction of this Court, and that unless I can make good my claim in the Prize Court my clients can have no remedy.

The libellants' claim is one which appeals strongly to the Equity

of the Court, and our position is not without powerful legal precedents to sustain it. I shall be told, however, as indeed I have been already told in this place, that the "Nassau" is now within the control of the Prize Court, and that Prize Courts take no cognizance of *latent* liens. If the "Nassau" be a Prize of war, in the strict and recognized interpretation of the term, I admit that there are precedents that go to that extent, although the rule is not without exceptions based on strong equities. Is the Nassau, then, Prize of war? To render her Prize of war, there must be war within the meaning of the law of nations. Prize of war is the offspring of legitimate war—*justi belli;* and it has no other parent. There may be prizes of forfeiture, there may be revenue prizes—but prizes of war exist only by right of war. The Prize Court is a Court of the Law of Nations. (The Walsingham Packet, 2 C. Rob., 83.)

International law, and not the municipal law of a country, governs its judgments. (Mitchell *vs.* Rodney, 2 Bro. P. C., 423; Le Caux *vs.* Eden, 2 Doug., 608; Lindo *vs.* Rodney, 2 Doug., 613.

It is upon this principle that Prize Courts have declined to take notice of latent liens. A lien is given by municipal law. The law of nations has no such word in its vocabulary. A Prize Court, sitting to enforce the law of nations—taking no cognizance of municipal law, save incidentally—cannot well be asked to enforce a right given solely by the municipal law. In the terse language of Sir William Scott, in "*The Hoffnung*," Hardrath, 6 C. Rob., 383, "the *right of war* is a right *in re*, and a Court of Prize attends only to the *res ipsa*, and the *onera* attaching on the property in right of possession."

International law, *ex vi termini*, means the law which governs the relations of different states with each other. Vattel designates it "the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights." Blackstone describes it (4 Com. 66) as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the earth, in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith in that intercourse which, must frequently occur between two or more independent states." A nation, then, to be within the provisions of international law, must be an independent power, established and recognized as such. A section of a nation, in rebellion against its constituted government, and unrecognized by that or any other government, is not a nation, and the law of nations does not apply to it. Foreign governments may, for the sake of convenience, adopt a principle of neutrality in their own relations with another power and its revolted subjects or citizens, but that does not constitute these subjects or citizens a nation, nor does it, save in terms simply conventional, invest the domestic or intestine contests of another people with the character of war. Lord Palmerston, during a late debate in the House of Commons, has placed this in a light so clear as to be unanswerable. "The right honorable gentleman," said his lordship, "had argued that we had taken a step towards the acknowledgment of the independence of the South by admitting

that the South had belligerent rights, but Vattel, and all the best authorities on the law of nations, hold that when a civil war breaks out in a country, and is firmly established there, other nations have a right to deal with those two parties as belligerents, *without acknowledging the independence of the revolted portion of the country.* Admitting that the war had been established on such a footing that each party is entitled to be regarded by other countries as belligerents, *the mere fact of our having acknowledged that those parties are belligerents in the international sense of the word, does not imply a step towards acknowledging one or other of them as an independent nation.*" Now, what other nations call "civil war," the government, against which its citizens revolt, designates "Rebellion." "War," says Blackstone, "is an appeal to the God of hosts to punish such infractions of public faith as are committed *by one independent people against another.*"

Is the Southern Confederation an independent nation at war with the United States, or is it a rebellious conspiracy, armed treasonably against the Constitution? If it be an independent power at war with the United States, then this ship is a Prize of war, amenable, *jure belli*, to the jurisdiction of a Prize Court. If not, if the Confederates be merely citizens in rebellion, what law, either international or municipal, constitutes the "Nassau" a Prize of war? "Prize of war" is not an empty, unmeaning phrase; it has a settled and determinate meaning within the purview of international law. It is the strict right of a belligerent in a legitimate war to seize, *jure belli*—by right of war—the ships and property of the enemy, and to confiscate them by a court specially constituted for that purpose under the law of nations. This right to capture enemy's property is an inherent one, as old as the time of the Romans. The Prize Court is a creation to enforce that right by confiscation.

What is an enemy within the meaning of the law of nations? Blackstone, (4 Com., 83,) in defining treason, says: "If a man be adherent to the king's enemies in his realm, giving them aid and comfort in the realm or elsewhere," he is guilty of treason. "By enemies," he goes on to say, "are here understood the subjects of foreign powers with whom we are at open war." "A rebel," he adds, "is not an enemy; an enemy being always the subject of some foreign power with whom we are at open war." So Chancellor Kent (1 Kent, 64) describes an enemy to be one who "owes permanent allegiance to the adverse belligerent, and whose hostility is commensurate in point of time with his country's quarrel."

This doctrine has already received the sanction of our own courts. A man named Chenowith was indicted in the United States Circuit Court at Cincinnati for the crime of treason—the overt act alleged being a purchase of arms for the use of the Southern rebellion. The indictment charged that on the 20th June, 1861, and thence hitherto, an open and public insurrection and war was and had been waged against the government of the United States by certain persons owing it allegiance, but styling themselves "The Confederate States of America;" and that Chenowith adhered to those persons,

being enemies of the United States, giving them aid and comfort. Chenowith was acquitted; the Court, (Swayne, J.,) holding that the overt act charged amounted to "levying war" against the United States under the first branch of treason, as defined by the Constitution, and was not "an adhering to their enemies, giving them aid and comfort," under the second. The reasons on which this decision was based may be shortly summed up as follows: Treason was a crime to which there could be no accessary. Its very nature demanded that a person accused, if guilty at all, should be guilty as a principal. Sympathizing with rebels was not a crime within the reach of the criminal law; but to supply rebels with arms, equipments, or provisions, or to assist them with military information, was not only to approve the design, but to participate in and contribute towards carrying that design into execution. Such acts amounted to a levying of war, and marching with it. (4 Cranch, App., 469, 470.) Persons so acting might—although the case did not call for any actual decision on that point—be indicted for substantive treason in levying war against the United States. But the term "enemies," employed in Art. 3, Sec. 3 of the Constitution, referred exclusively to *foreign enemies in time of open war*, and could not be made to embrace those aiding insurgents and rebels. From all the authorities it was clear that a rebel was not, in contemplation of law, an enemy, and as an inevitable consequence the United States could not exercise *belligerent rights*, so called, in respect either of the persons or property *of their own citizens*. The Confederate States might be belligerent *de facto* in the estimation of European powers, but they could not be so regarded by the government of the United States in any of its departments without thereby, and necessarily, acknowledging their independence.

A rebel, then, is not an enemy within the meaning of international law, and his ships and property are not liable to capture, *jure belli*, and to forfeiture by a Prize Court under the law of nations. And for the same reason, namely, that there is no war within the meaning of that term as used in the law of nations, ships of other countries, however connected with the rebellion, are not liable to capture, *jure belli*, or to condemnation by a Prize Court under the law of nations, and can only be held liable to capture under some municipal law specially provided to meet the emergency. Rebellion, which is neither more nor less than the treasonable act of *levying war* within the meaning of the criminal law, (4 Cranch, 473–4,) must be punished in the person and property of the rebel by the municipal law of a country, or it cannot be lawfully punished at all. The act of "levying war" against a government will hardly be confounded, by any one cognizant of the most simple elements of general jurisprudence, with that of waging an open war, *justum bellum*, within the meaning of the law of nations. "Levying war," says Bouvier, "is a *technical* term borrowed from the English law, and its meaning is the same as when it is used in Stat. 25, Edw. 3;" (4 Cranch, 471; *U. S. v. Fries*, Pamph. trial; 1 East P. C., 62 to 77; Alis. Cr. Law of Scot., 606; 9 C. and P., 129.) It is a term applicable only to the crime of high treason, and is unknown to the law of nations. War levied against the king, under the criminal

law of England, is of two kinds, direct and constructive; direct, when the war is levied directly against the king or his forces, with intent to do some injury to his person, to imprison him, or the like, (1 Hale, 131, 132,)—such, for instance, as *open rebellion*, (1 Hale, 152,)—constructive, when it is levied for the purpose of effecting innovations of a public nature by an armed force, or any similar purpose, (Fost., 211; 1 Hawk., c. 17, s. 25; 1 Hale, 153; Rex *v.* Lord G. Gordon, Doug. 590.) An indictment for treason, under the criminal law of England, against a person compassing the king's death—for shooting at the king, for example, as in the case of Hadfield—charges him specifically with "levying war within the kingdom, against the king," (Arch. Crim. Plead., 379.) To compass the king's death includes every act deliberately done or attempted, whereby the king's life may be endangered, (Foster, 195.) Going armed for the purpose of killing the king is to compass his death, and is a "levying war" within the meaning of the criminal law, (Fost, 195.) When, therefore, the term "levying war" is used, it points to an overt act of treason committed against the government by a citizen owing allegiance to it, and not to waging a war by a foreign power under the general terms of the law of nations.

Ours, may it please the Court, is no doubt a remarkable case; but it is not without precedent. The independence of the United States was achieved by armed revolt against the British government. The struggle which ensued on our declaration of independence is designated in history as "the Revolutionary War;" but England treated it, as we treat the insurrection in the South, as rebellion; which, indeed, it was as well in law as in fact, so long as our independence was not achieved.

By the laws of England, (Black. Com., vol. 3, pp. 250, 384, 387,) the crime of treason involves severe penalties. Real estate escheats to the crown *on attainder*, and the finding of office for the crown vests the forfeiture. It is different with respect to personal estate, which is only forfeited *on the conviction* for treason. When the revolt of the American colonies occurred, therefore, there was no law by which the ships and property of the Americans could be seized on the high seas, and lawfully confiscated. They could not have been captured as enemy property, *jure belli*, because a rebel is not an enemy, and war can only exist between foreign and independent powers. They could not be confiscated as the property of traitors, because, being personal property, a conviction for treason must *precede* forfeiture. What course did the government pursue? They introduced, and carried through Parliament, a special act to meet the case. We have all heard of the British Prohibitory Act, which forms so important a feature in the history of the Revolution. That act, and that act alone, enabled British cruisers to make prize of American ships, as well as the ships of foreign countries trading with the revolted colonies, on the high seas, or wherever found, and enabled the British Prize Court to condemn them "as if they were the property of an open enemy." Without that act no capture would have been lawful; without that act, which conferred special jurisdiction for that purpose, no *Prize Court* could have assumed or lawfully exercised jurisdiction over them. That act, (16, Geo. 3, Cap.

5,) provided, among other things, "That all ships and vessels of, or belonging to, the inhabitants of the colonies therein specified, together with their cargoes, apparel, and furniture, and all other ships and vessels whatsoever, with their cargoes, apparel, and furniture, which should be found trading in any port or place of the said colonies, or going to trade, or coming from trading in any such port or place, (except as therein after excepted,) should become forfeited to his majesty, *as if the same were the ships and effects of open enemies*, and should be so adjudged, deemed, and taken in all courts of admiralty, and in all other courts whatsoever." And further, "That, for the encouragement of the officers and seamen of his majesty's ships of war, the flag officers, captains, commanders, and other commissioned officers in his majesty's pay, and also all the seamen, marines, and soldiers on board, should have the sole interest and property of and in all and every such ship, vessel, goods, and merchandise, which they should seize and take, (being first adjudicated lawful prize in any of his majesty's courts of admiralty,) to be divided in such proportions, and after such manner, as his majesty should think fit to order by proclamation thereafter to be issued."

This act, it will be observed, closed the ports of the colonies against all external intercourse, and the jurisdiction, to which the ships and property captured under its provisions were expressly subjected, was not the ordinary Prize Court constituted under the law of nations, but the Court of Admiralty specially empowered to condemn vessels captured under its provisions as "lawful prize." "The Prohibitory Act itself," said Sir Jas. Marriott, in his judgment in the case of the *Louisa*, "regulates the mode of procedure." (See also *The Dickenson*, H. & M., 1. The *William & Grace*, H. & M., 76.)

It was *not*, therefore, under the law of nations that Great Britain made capture of the ships and property of the revolted colonists, or of foreign or neutral ships trading with them, or that her courts undertook to condemn either the one or the other, but under the act of Parliament to which I have just called your Honor's attention; by the provisions of which their capture and their condemnation were authorized in the same manner as the ships and property of "an open enemy." Had they been, in point of law, "open enemies" by the mere fact of their armed rebellion, such an act would have been unnecessary. No one can read the provisions of that act without being convinced that the Prize Court, adjudicating under its authority, was not a court of the law of nations, but a court specially empowered in aid of the municipal law of England, to punish treason by the confiscation of the property of those who, under that act, were attainted as traitors. The strong analogy existing in their abstract features between the present relations of the Federal Government to the States in insurrection, and that of Great Britain to the revolted Colonies in 1776, no doubt suggested to Congress the necessity of making similar provision for the confiscation of rebel property, and the prohibition of external trade with the ports of the insurrectionary States. I find such an act on the Statute book. On the 13th July, 1861, Congress passed an act "further to provide for the collection of duties on imports." By the fourth section of that act the President is empowered, whenever the duties on

imports cannot, by reason of unlawful combinations in opposition to the laws of the United States, be effectually collected in any collection district by the ordinary means and in the ordinary way, to close the port or ports of entry in said district, and in such case to give notice thereof by proclamation, and it is provided that if, while said ports are so closed, any ship or vessel *from beyond the United States*, or having on board any articles subject to duties, shall enter, or *attempt* to enter, any such port, the same, together with its tackle, furniture, apparel, and cargo, shall be forfeited to the United States. *Sec.* 5 provides, that whenever the President shall have called out the militia under the Act of 28th Feb., 1795, to suppress combinations against the government, and to cause the laws to be executed, and the insurgents shall have failed to disperse, the President shall be empowered by proclamation to declare the inhabitants of States disobeying to be in a state of insurrection against the government, and thereupon all commercial intercourse between such States and other States of the United States shall cease, and be unlawful so long as such condition of hostility shall continue, and all goods, &c., coming from or going to and between said States, shall be forfeited to the United States. *Sec.* 6 declares that after fifteen days from the issuing of such proclamation, any ship or vessel belonging in whole, or in part, to any citizen or inhabitant of said States, whose inhabitants shall be so declared in insurrection, found at sea, or in any port of the United States, shall be forfeited. *Sec.* 7 authorizes the President, in the execution of the act, and of the laws of the United States, providing for the collection of the duties on imports and tonnage, to employ, in addition to and in aid of the revenue cutters in service, such other suitable vessels as may, in his judgment, be required. *Sec.* 9 provides that proceedings on seizures, for forfeiture under the act, shall be pursued in the courts of the United States, in any district into which the property so seized may be taken, and proceedings instituted. Here, then, we have the material features of the Prohibitory Act. The rebel States may, by the President's proclamation, be declared to be in rebellion; the ships and goods of the inhabitants are declared forfeit; external commerce with the insurrectionary States may be prohibited, under penalty of forfeiture; and the President is empowered to employ the public ships of the United States, without limit, in preventing intercourse with the prohibited ports. On the 16th day of August, 1861, the President issued a proclamation pursuant to the provisions of this act, declaring certain States to be in insurrection, and that all commercial intercouse between those States and other States and other parts of the United States would be unlawful. Whether this language is *a closing of the ports* within the meaning of the 4th section of the act, so as to forfeit ships from beyond the United States, entering or attempting to enter, is a question I do not care to discuss, as I think either view equally corroborates the position which I have taken upon this subject. Any doubt upon this point, however, would seem to be set at rest by the terms of another proclamation, issued on the 12th of May, 1862, by which the President declares these ports to be still in a state of blockade, under and in virtue of his proclamation of April 19, 1861.

The proclamation certainly does forfeit to the United States all property passing between any of the rebellious States and any other part of the United States, by land or water, together with the vessels or vehicles conveying the same, or carrying persons to or from said States to or from any other of the United States. And does, after fourteen days, forfeit to the United States all ships and vessels belonging in whole or in part to any citizen or inhabitant of any of said rebellious States, whether the same be found at sea or in any port of the United States.

We have at present no authoritative intimation of the causes for which, or the circumstances under which the capture of the *Nassau* has taken place. She may have been seized on any one of the following grounds:—1. As a ship owned by rebels. 2. As a vessel owned by aliens, entering or attempting to enter the ports closed, or claimed to be closed, in virtue of the Act of July 13, above referred to, by the proclamation of August 16th. Or 3. She may have been seized as an alien ship attempting to enter a Southern port in violation of the President's proclamation of blockade of April 19, 1861; and, in connection with this supposed latter ground of seizure, it may be argued that the very existence of a blockade constitutes a state of war within the meaning of the law of nations.

Now, as regards the first of these grounds, if it be held that the *Nassau*, although colorably claimed by British subjects, belonged, as there are strong grounds for supposing she did belong, actually and *bona fide* to citizens residing in one or more of the insurrectionary States, then there can be no doubt that under the Act of 13th July, 1861, she was rightly captured, and is liable to forfeiture; but to forfeiture in what character, and by what jurisdiction? As Prize of war, and by a Prize Court? Assuredly not. The 5th and 6th sections of the Act of 13th July, 1861, declare a ship captured under such circumstances to be forfeited to the United States as rebel property simply; and the 9th section of the same act declares the District Court to be the jurisdiction by which that forfeiture shall be pronounced and enforced. The word prize does not occur throughout the act, and a ship seized under the 5th and 6th sections can no more be adjudged *Prize of war*, or be brought within the jurisdiction of a *Prize Court*, than could a vessel seized by revenue officers for a breach of the revenue laws. In the case of the *Recovery*, (6 C., Robinson, p. 348,) which was the case of a vessel seized for a breach of the navigation laws, and proceeded against for such offence in the Prize Court, Sir William Scott held that that branch of the Court of Admiralty, *being a court of the law of nations*, had not jurisdiction to entertain such a case, and ordered restitution to the neutral.

The two acts are strikingly similar in their leading features. The one declared the ships and goods of the inhabitants of the rebellious colonies to be forfeited to the crown, the other declares them forfeit to the government. The British act provided a specific jurisdiction in the nature of a Prize Court for the condemnation of vessels so seized; our act invests the ordinary district courts—not sitting in admiralty, for the adjudication of maritime questions—not sitting as a Prize Court—but sitting as District Courts simply, with the jurisdiction to deal with every case arising

under the act. If we assume that the act must be understood to confer this special jurisdiction on that department of the District Court which takes judicial cognizance of admiralty cases or revenue forfeitures, still the jurisdiction would be in this, the Instance Court, and not in the Prize Court, (*The Recovery*, 6 C., Rob., 347,) and a suit entered in the Prize Court would be taken *coram non judice*, and could not, by any torture of the language of precedent, be held to oust the jurisdiction of this Court to recognize and adjudicate upon the lien we claim.

It may be contended that the Prize act of March last confers on the Prize Court an inferential jurisdiction to deal with such a case. I have read that act with attention, and I have no hesitation in saying that it would have been an excellent prize act had the United States been engaged in war, (a legitimate war, within the meaning of the law of nations,) with any foreign power; but it no more touches this case—it has in fact no more connection with, or relation to, the insurrection of the South, than it has to the Tae-ping rebellion in China. The words rebellion and insurrection do not once occur throughout the act. It is an ordinary prize act, framed to correspond with a condition of foreign war, and to meet and enforce the inherent right of capture of enemy property, *jure belli*, under the law of nations. Will it be pretended for an instant that a jurisdiction to condemn the property of rebels, or of foreigners trading with rebels, can be inferred and assumed by a Prize Court so constituted, which is a Court of the law of nations only, in the face of, and in contradiction to, a specific municipal law which vests the special jurisdiction in every such case in the District Court? The British act authorized the capture and condemnation of rebel ships and of foreign ships trading with the colonists, "as if the same were the ships of an open enemy," authorized their condemnation as rebel property, and conferred jurisdiction in such cases upon the Prize Court, and yet the question arose in the Prize Court itself, whether the condemnation should be as Prize of *war*, or as prize of *forfeiture for rebellion*. The jurisdiction of the Prize Court was not questioned, because that jurisdiction was prescribed by the act itself; but if the act, instead of creating a special court for the purpose, had thrown the jurisdiction upon the Court of Assize for the County of any port into which such a capture were to be brought, does any one imagine that an ordinary Prize Court would have assumed to exercise a jurisdiction by inference?

The case of "*the Dickenson*," (1 Hay and Marriott, 1,) is not without point in this connection. "*The Dickenson*" was owned in Philadelphia, which port she left on 16th February, 1776, with a cargo for Nantz, with instructions to return with ammunition and other warlike stores. On the passage she was seized by the mate and crew, who navigated her to an English port, where she was first taken charge of by revenue officers on behalf of the crown, and subsequently seized as prize by an officer from the government tender "*Rose*" under the terms of the Prohibitory act. The case was heard in the Prize Court before Sir George Hay, claims being interposed, 1. By the admiralty, who claimed it as *Prize of war*, coming to the admiralty as a Droit; 2. By the treasury, who

claimed it as a forfeiture to the King's Exchequer under the act; and, 3. By the officer, who claimed it as prize of the "Rose." The question was not, whether the ship and cargo should be condemned, because, being undeniably the property of colonists in revolt, she was clearly liable to forfeiture under the act of Parliament; but whether she should be condemned as a prize of forfeiture to the King's Exchequer, or as a Droit of admiralty, as being a Prize of war, captured by a non-commissioned officer—(the claim of "*The Rose*" being at once negatived, owing to the circumstance of her previous seizure by the officers of the Customs.) The argument of the King's advocate, the late Dr. Marriott, and perhaps one of the best admiralty lawyers who ever lived, is worthy of attention, because it contained what I believe to be a very clear exposition of the law upon this question. Dr. Marriott appeared to support the claim of the Treasury, and denied that she was Prize of war; but claimed the confiscation of the ship and cargo as a forfeiture to the Crown under the terms of the act of Parliament. "The word of the 'act,'" he said, "is forfeiture, and when the word prize is used, it is only a subsequent to the forfeiture being first adjudged. For the right of the King's officers, as captors, is only in expectancy, after being first adjudged lawful prize, *not Prize of war, but of forfeiture*, first vested in the Crown." "A new crime arises unforeseen by the Legislature. It is declared by Parliament; and a *new penalty* is provided for restraining it. This escheat and forfeiture, newly created, is not given to the Commissioners of the admiralty by the act; nor could it have been in the purview of their commissions. The act is clearly, in its operation, *a bill of attainder*. It punishes without the form of judgment, or conviction, and evidence. All the inhabitants of the rebellious colonies, however innocent, are involved, who come not under the peculiar exceptions of the act, and their ships and goods are escheated to the King." "The word prize is introduced in the end of the second clause, which vests the sole property in the captors, after being first adjudged lawful prize. The first clause declares the ships and goods of the enumerated colonies in rebellion to be forfeited to the King. But giving that word prize all its force, it must be understood to be *prize of forfeiture, for cause of rebellion, not of war*; that the word prize follows, not leads, the proposition in the act of Parliament, and that in order to be adjudged prize, (under the act,) a ship must first be adjudged to be forfeited. The sentences of the court must conform themselves in their style to the terms of the act of Parliament. The style upon the war act will not suit this subject, nor the times which have given birth to it." By war act the learned advocate meant the General Prize act. "The war act only said that prizes taken shall be the property of the captor. But here this act expressly says, that all the ships and goods of the inhabitants of the rebellious colonies shall become forfeited to His Majesty. They must therefore be adjudged accordingly. And when the act goes on to say, as if the same were the goods of open enemies, and shall be so adjudged, deemed, and taken in all courts of admiralty, if there is any grammar in the world, the word forfeited is the antecedent, and the term to which every thing that follows is relative.

It means, also, that they shall be proceeded in by monition, and by other modes prescribed by the act; and where the act does not mark the line, then the proceedings are to be in such form, *as if the same were in a lawful war*, according to the usual course of admiralty proceedings, but still as forfeited to the King, simply and plainly."

This argument was never answered. In order to constitute the ship a prize of war, under the provisions of the statute which authorized the capture, it was necessary to resort to the fiction that the act of Parliament amounted to a declaration of war. Sir George Hay decided the case upon this fiction, but I find from a note to the report, (Hay and Marriot, 50,) that he afterwards declared privately to the King's advocate that he was mistaken in his decision, and was very sorry for it; as well, indeed, he might, seeing that under the British constitution the prerogative of declaring war does not vest in the Parliament, but in the sovereign of the realm; and it is a notable circumstance that very shortly after, the same judge (The William and Grace, Hay and Marriot, 76,) condemned a ship and goods, the property of a Dutch citizen, captured on their passage from an American port, not as prize of war, but "*as a forfeiture to His Majesty.*" Sir George Hay appears to have very shortly after this been succeeded, on the bench of the admiralty court, by Sir James Marriott, and thereafter we find this learned judge condemning American ships and property under the act, invariably as "rebel property"—not as Prizes of war, for the reasons so ably stated by him in his argument in *the Dickenson's* case, but *as forfeitures to the King for rebellion.* (See the *Louisa*, Hay and Marriott, 145. "Ship and stores condemned *as rebel.*" The *Rebecca*, Hay and Marriott, 214. "Cargo—rice—condemned *as the property of rebel Americans.*") Assuming, then, for the sake of argument, that a prize court in this country possessed jurisdiction to condemn a ship belonging to citizens of the insurrectionary States, it is manifest, on the strength of these authorities, that the vessel could not be condemned as Prize of war, but as a forfeiture to the government for rebellion; and in that case not only would the precedents borrowed from the judgments of the Prize Courts, in connection with Prizes of war captured and condemned, *jure belli*, under the law of nations, be totally inapplicable to the present case, but numerous cases in our books could be cited to show that the admiralty courts in cases of revenue forfeiture or other public claim, *in rem*, have invariably recognized and given priority to private liens, and especially to the liens of material men. The case of the *St. Iago de Cuba*, (9 Wheat., 409,) is a very strong one in this connection. The ship was seized and condemned as a slaver, but the claims of material men were interposed, and Mr. Justice Johnson held that "the forfeiture did not ride over the rights derived under maritime contracts, whether they were called liens or privileges," and ordered the claims of the material men, who were innocent of all knowledge of, or participation in, the illegal voyage to be allowed, preferably to the claim of forfeiture on the part of the government. *In Phillips and al. v. Thomas Scattergood*, Gilpin's R. 1, it was held that material men, having a lien on a vessel which had been taken and sold under a

judgment in favor of the United States, were entitled to a priority of payment out of the fund. But it is manifest that under the terms of the act of 13 July, 1861, the Prize Court can have no jurisdiction over this ship, supposing her to have been rebel property at the time of her capture, and that in that case she can only be declared confiscate by suit in the District Court. No such suit has been instituted. On the contrary, in that event, the only suit by which the ship is lawfully within the jurisdiction of the admiralty court is that in which we appear as libellants, and that suit it is now sought to dismiss peremptorily and without a hearing.

But the Nassau may have been captured upon the second ground to which I have referred, namely, as a foreign ship, (her nationality having been conveniently changed by sale since the commencement of the rebellion,) entering or attempting to enter the ports closed, or claimed to be closed, by the Act of July 13, and the proclamation of August 16. Supposing this to be the case, I do not see that the position of the captors in the Prize Court is at all improved by it. Unless this ship has been captured, *jure belli*, or unless a Prize Court has been specifically empowered by some municipal law of the United States, no Prize Court can have any jurisdiction to deal with her. We certainly are not at war with Great Britain, and therefore it is clear that the ship cannot have been captured *jure belli* as the property of British subjects simply, and cannot be condemned as *prize of war* on that ground. I am not going to contend that the right to seize the ships and goods of foreigners engaged in giving assistance to the rebels does not exist. The right of self-preservation is a right as inherent in a nation, and in a public sense, as it is in an individual. The citizens, who, in the phraseology of the criminal law, are engaged in "levying war" against the government of the United States, are guilty of *treason;* and every one, without regard to nationality or allegiance, who, within the jurisdiction of our Admiralty, conspires with, or assists, or by overt act manifests an intention or purpose to take part with, or assist, the rebels in that criminal purpose, is *particeps criminis*, and liable *as a principal* to the penalties of the criminal law, equally with the rebels themselves. But rebellion is only treason after all, and if the citizen rebel be not an open enemy within the meaning of the law of nations, it is clear that a foreigner who aids him in his treason can, by no torture of the language of public law, be held to be so. We possess, no doubt, the inherent right, as a measure of self-preservation, to seize *within our own waters* any foreign ship employed in the service of the rebels; but seizure is one thing, and condemnation is another. The law of the 13th July, 1861, gives the District Court power to declare the ships and goods of rebel citizens forfeit to the United States, but it makes no similar provision for the forfeiture of foreign ships employed in the service of the rebels simply. Nor does the right of forfeiture on such a ground exist either by the criminal or the common law of the United States. What are the penalties of treason under our criminal law? In this country there is no attainder for treason. Not only does the Constitution (Art. 1, sec. 9, § 3) forbid the passing by Congress of any bill of attainder, or *ex post facto* law; but by the Act of 13th April, 1790, Congress has declared that not

even conviction for treason shall work corruption of blood, or even forfeiture of estate. The punishment of forfeiture, therefore, which might have followed on our adopting the common law of England, must be considered to have been abolished in the United States. Confiscation and forfeiture, therefore, do not legally follow even upon a conviction for treason, and there is no law which empowers a Federal Court to adjudge a foreign ship forfeit because she is employed simply in aid of the rebellion. Does such a ship become *Prize of war*, and subject to the jurisdiction of a Prize Court, because she attempts to enter a port of the United States with which intercourse from without has been prohibited by the proclamation of the President, and wherewith, as far as is practicable, such intercourse is prevented by what, for convenience, probably, rather than in strictly legal phraseology, has been designated "the blockade?" It can scarcely, I imagine, be necessary for me to point out the very transparent circumstances that distinguish the measures adopted by the President for prohibiting foreign intercourse with the rebellious States, from a blockade within the meaning of the law of nations. There are two modes by which intercourse with a prohibited coast may be lawfully and authoritatively interdicted. One of these is by blockade under the law of nations, and applies exclusively to the coasts of a foreign enemy with whom we are at open war. The other is a municipal regulation, whereby a nation at peace with foreign powers closes its own ports against external commerce, either for its own protection, or, as in the case now under review, for the purpose of shutting out external aid and comfort from citizens in insurrection. Either and both of these measures lie within the power of Congress; the President of the United States can, under the Constitution, establish neither the one nor the other.

All the ports which the proclamation of the 19th April professes to close against foreign intercourse, are in point of law ports of entry of the United States, in which, however, the authority of the Federal officers has, by the rebellion, been temporarily, (and only temporarily, as we are entitled to assume,) arrested. No one can doubt that it was in the power of Congress, as a measure of public safety, to prohibit intercourse with those ports, and to enforce that prohibition by what, in its practical features, assimilates to the character of a blockade under the law of nations; but giving such a measure its widest effect, it would amount only to a municipal regulation for preventing external aid and comfort being communicated to the rebels.

To close the ports of a *foreign* power, with which we are at war, it would be necessary to resort to a blockade under the law of nations. The interdiction of intercourse with our own ports is simply to close them as ports of entry under the acts regulating trade and commerce. Blockade is a belligerent right exercised under the law of nations by one independent power against the commerce of another. Sir William Scott describes it, (The Fox, Edw., 321,) as "*an operation of war.*" Again, in the case of *the Henric and Maria*, 1 C., Rob., 148, he says: "A declaration of blockade is a high act of sovereign authority." "Natural sovereignty," says Bouvier, (Law Dict., Art. Blockade,) "confers the right of declaring war, and the

right which *nations at war* have of destroying or capturing each other's citizens, subjects, or goods, imposes on neutral nations the obligation not to interfere with the exercise of this right within the rules prescribed by the law of nations. A declaration of a siege, or blockade, is an act of high sovereignty." In the case of our revolt against Great Britain, the ports of the American colonies were, as we have seen, statutably closed against all external commerce, by the terms of the Prohibitory act, *not by the declaration of a blockade under the terms of the law of nations.* Under the provisions of that act, the court held, in the case of "*The William and Grace*," (Hay and Marriott, 76,) that "all ships and goods, *whether American or others*, going to, or coming from, the rebellious colonies, were a forfeiture to His Majesty;" and again, in the case of "*The Sally*," (Hay and Marriott, 93,) Sir George Hay, in giving judgment, said, that the act of Parliament was the rule to go by. "The prohibition," he said, "was clear, that all ships and goods of the inhabitants of the enumerated colonies declared (by the act) to be rebellious, *and all other ships* going to trade, and coming from trading there, were to be confiscated." In the case of "*The Louisa*, (Hay and Marriott, 145,) Sir James Marriott said, "The American prohibitory act regulates the modes of proceeding;" and he condemned the ship and stores—as Prize of war? No; "*as rebel.*"

But upon the third ground to which I have referred, does the measure, which, for the sake of argument I am willing to call a "blockade," constitute the civil struggle in which we are engaged, a war within the meaning of the law of nations? Can your Honor fall back upon a fiction so erroneous as that which avowedly misled Sir George Hay, in the case of "The Dickenson?" I imagine not. The prerogative of declaring war, under our Constitution, lies with Congress alone. "To legalize a war," says Bouvier, (Art. War,) "it must be declared by that branch of the government entrusted by the Constitution with power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." The ports of the rebel States have been closed to foreign commerce, if closed at all, by the proclamation of the President, not by an act of Congress. There is no war within the meaning of that term as used in the law of nations, because no act of Congress has declared it. There is no war, because no independent power, recognized as such within the family of nations, has declared war against, or is at war with, the United States. How then will you hold this to be a blockade within the law of nations; and how will you condemn this ship in another department of this court as "*Prize of war*, because—for that is the true offence charged—she has sought to enter a port which has been municipally closed as a lawful port of entry of the United States? The President's proclamation, I know, professes to declare a blockade, not only under the laws of the United States, but "under the law of nations" as well. His power to do either the one or the other, save under the express authority of Congress, however, cannot be plausibly argued. "The power to declare war," says Mr. Justice Story, "is exclusive in Congress. *It includes the exercise of all ordinary belligerent rights, and Congress may, therefore, pass suitable laws to enforce them.*" *(Story on Const.*, art. 1177.) A *block-*

ade is an ordinary belligerent right, recognized by the law of nations, and Congress, under this authority of Mr. Justice Story, is the only power in the State that can constitutionally declare it. The declaration of an *embargo* is not an operation of war, since it may be put in force, not only without the existence of war, but without necessarily implying or provoking hostilities, and yet the power to declare an embargo lies in Congress, and not in the President. *(Story*, 1290.*)* If such a power as this, not specifically vested any where by the Constitution, has been held by the judiciary to vest in Congress, most certainly an operation of war so important as that of declaring a general blockade cannot be held to fall within the limited powers conferred on the President by the Constitution, in the face of an express provision vesting the power to declare war, (including, according to Mr. Justice Story, the exercise of all the ordinary belligerent rights,) and of dealing with offences against the law of nations, *in Congress exclusively*. If the President of the United States were to be held authorized to declare a blockade under the law of nations without the sanction of Congress, such a concession would be tantamount to conferring upon the President the power to declare war. For, although a blockade is an operation of war, yet it is a well established fact that war may be commenced by actual hostilities, without any express declaration. To declare the coast of a foreign nation, with whom we are not at open war, to be under blockade, would be a hostile act, tantamount, under international law, to a declaration of war, and if the President has the power to declare it in one case, he has it in another, and might thus at any moment involve the country in a war without the sanction of Congress. Undoubtedly such a power does not rest with the President under the Constitution. Besides, to declare the ports of the Southern States under formal blockade, within the law of nations, would be to admit that coast to belong to an independent State, and to be beyond the legal operation of the federal laws, not simply as between the government and the inhabitants of the insurrectionary States, but as affecting foreign nations, trading to this country. Are we prepared to do this?

There is innate evidence on the face of the Proclamation itself, that its promulgation by the President was intended only as a temporary measure, having for its object the closing of the insurrectionary ports against external intercourse until Congress, at its special session, should deliberate on the question, and make constitutional provision for enforcing such a measure in due form of law. The words of the proclamation are these: "Now, I, Abraham Lincoln, President of the United States, with a view to the same purposes above mentioned, and to the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful avocations, *until Congress shall have assembled*, and deliberated on the said unlawful proceedings, or until the same shall have (sooner) ceased, have deemed it advisable to set on foot a blockade of the ports within the States aforesaid," &c. Again, in his message to Congress, delivered on the 4th of July, 1861, the President as explicitly admits the temporary nature of the proclamation. After stating the measures adopted by him on the instant

for the preservation of the peace, and particularly the calling out of the militia, and "the closing of the insurrectionary districts by proceedings *in the nature of* a blockade," he says:—"These measures, *whether strictly legal or not*, were ventured upon under what appeared to be a popular demand and a public necessity, *trusting then, as now, that Congress would ratify them.*" The Secretary of the Navy, in his Report laid before Congress on the same day, describes the effect of the proclamation to be "*an interdiction of communication with the ports of the insurgent States*, and a declaration of *an embargo* or blockade." Whether the Secretary of the Navy was under the impression that an embargo and a blockade were convertible terms, implying the same operation, or whether, as was most probably the case, he had not been able to make up his mind what the anomalous measure adopted by the President, at a moment of serious pressure, could constitutionally be designated, he, at least, succeeded in stamping its unconstitutionality by classifying it with a measure to which it may be said in some respects to bear strong kindred, the right to enforce which, however, as I have already shown, has been judicially declared to lie in Congress, and not in the President.

Even when actual hostilities have been commenced by a foreign power against the United States, Congress has exercised the right of *declaring a state of war to exist*. In the case of Mexico, in 1846, Congress passed an act for the prosecution of the war, which commenced with a declaration that, "by the act of Mexico, a state of war existed between that government and the United States;" and the proclamation issued by President Polk, immediately on the passing of that act, contained the following significant preamble:—"Whereas, the Congress of the United States, *by virtue of the constitutional authority in them vested*, have declared by their act, bearing date this day, that by the act of the Republic of Mexico, a state of war exists between that government and the United States." What have Congress done in the present case? Have they declared a state of war to exist between the Confederate States of America and the United States? No; Congress has declared the inhabitants of certain States to be in insurrection against the government; has made provision for the suppression of that insurrection; has declared the ships and goods of the rebels to be liable to capture on the high seas, and to confiscation by the *District Court;* and has given express power to the President to close by proclamation the ports of the insurrectionary States against foreign commerce. If the President's proclamation, as a measure of temporary safety, ever had any legal effect, that effect has been superseded by the act of Congress—possessing, as Congress does, an overruling authority under the constitution to deal with questions of war and offences against the law of nations—making other and more expedient provision for closing the insurrectionary ports against foreign intercourse. Those ports must be closed under that act, or there is no present power under the law to close them at all against the ships of foreign powers at peace and amity with the United States. Such a form of blockade as that so authorized by Congress, is the only one really applicable to the present emergency, and is strikingly similar to that enforced by Great Britain against the

American colonies in 1776. Why has the proclamation necessary to give effect to this measure not been issued? Why are we driven to the necessity of maintaining a rigorous blockade under the provisions of the law of nations, which has no application to the present state of things save by our own act, and of perilling our peaceable relations with foreign powers, when, by proclaiming the insurrectionary ports closed as ports of entry, we need not keep a single ship off one of those ports, except for our own convenience as a revenue measure, and to enforce our own measures of rigor and prevention against the rebels of the South?

The assumption by the President of the power to close the rebel ports by blockade, even though not sanctioned by the Constitution, might, perhaps, under such an emergency and in anticipation of the early and special assembling of Congress, be excused in the minds of loyal citizens by the circumstances that gave rise to it, and by the fact that its ostensible purpose was to protect the commerce and property of the loyal, and to shut out external aid from the insurgents. But that excuse ceases to have force, now that Congress, the Constitutional power, has, with a full knowledge of all the facts, made special statutable provision for prohibiting intercourse with the insurrectionary ports, by the only means legitimately applicable to the occasion; and citizens whose property, like that of the libellants in this case—for the lien they claim on this ship is property—is being placed in peril by the very measure which they were told was to protect it, are entitled to come forward and to say:

"This proclamation of blockade is waste paper under the law of nations, because it is made by the President without warrant of the Constitution; because Congress, the only power that can constitutionally deal with such a question, has seen fit to make other and more appropriate provision for closing the ports of the insurgent States against external intercourse; and because the giving effect to such a measure under the law of nations, would be to recognize the South as an independent power, entitled to declare war against the United States, instead of treating the Southern ports as—what they lawfully are, and what, so long as the *independence* of the South is unrecognized by foreign powers, those powers are bound to acknowledge them to be—ports of entry of the United States, with which it is in the power of Congress to regulate foreign commerce, and from which Congress may prohibit and exclude foreign commerce and intercourse, whenever necessary and expedient."

Had the President given effect to the act of Congress, and closed the Southern ports as ports of entry by proclamation, the Nassau, or any other ship owned out of the United States, attempting to enter any of those ports, might have been seized and condemned in the District Court, not as a Prize of war, but as a revenue forfeiture. In the absence of such a proclamation, I know of no law, international or municipal, by which a foreign vessel entering, or trying to enter, those ports, can be condemned either as Prize of war, or prize at all. She may be seized on the ground of her employment in aid and comfort of the rebels, but condemned and forfeited she cannot lawfully be. Giving its widest effect to the President's proclamation, it cannot be viewed as other than a merely preventive measure, not imparting to it any operation within the letter of the law of nations.

It may be said that the blockade has been recognized by foreign powers, and is therefore binding on their subjects. Foreign powers, and England among the rest, have recognized a condition of *civil war* to exist on this continent, and have conceded belligerent rights to the insurrectionary States. Those powers, therefore, are bound to recognize any legitimate operation of war *on either side*, and blockade is undoubtedly one of these. Nor would neutral governments be willing, or, perhaps, justified in questioning the constitutional authority by which a measure of so important a character as a blockade had been declared by one belligerent against the ports of another belligerent. They would feel that this was a question to be settled by the courts of the belligerent power declaring the blockade, and in the absence of any decision of those courts pronouncing the blockade to have been illegally or unconstitutionally declared, they would consider themselves bound to assume that the authority was sufficient. And this is precisely the principle upon which the British government professes to have acted. In the House of Lords, on 10th March last, Earl Russell, Secretary of State for Foreign Affairs, in reply to a question from Lord Stratheden (Lord Campbell) respecting the blockade, said:—"There are various questions connected with a blockade, which they (the government) had to consider. The first was, whether there was sufficient authority for instituting it. Lord Stowell says, that a blockade must be the act of a sovereign authority. This (the American blockade) was the act of the President of the United States, who, on the 19th April, issued a proclamation declaring that the blockade was about to begin, and that act was followed by the armed ships of the United States blockading the several ports, and warning vessels off the coast. Therefore, there can be no question as *to the authority* by which the blockade exists." His Lordship offered no opinion whatever as to the sufficiency under the laws and Constitution of the United States of that authority. He left the whole question as to the legality of the blockade to the decision of the national courts. "No one will say," continued his Lordship, "that there are not judges in America quite competent to decide questions of international law—judges who have inherited the precepts, and doctrines of such men as Chancellor Kent, and Justice Story—quite competent to pronounce judgment according to law, and who, I believe, would not have departed from the law in their decisions in such cases. But I do not find that there has been any real discussion in the Prize Courts of America, except, perhaps, in one or two instances with respect to the efficiency of the blockade."

But, whatever may be the opinions of foreign governments on the subject, we, that is, our government and Congress, have all along denied, and still deny, the existence of war; because we refuse to recognize the existence of any power in the Southern combination against the laws to declare war against the United States. How then can we, while on the one hand we maintain the South to be simply insurrectionary, treat them, on the other hand, as belligerents, in order to justify a blockade of their ports under the law of nations? If they were at war with us within the meaning of the law of nations, then we should be entitled to blockade their ports

in the strict meaning of that term, (provided such a measure were directed by Congress, and not otherwise,) and in that case, no doubt, a Prize Court would be the proper international court to adjudicate on vessels captured in attempting to evade it. But if we are simply suppressing a rebellion, then the legitimate, and only legitimate, mode of prohibiting intercourse, is by closing the ports of the insurrectionary States as ports of entry, as England closed our's in 1776, and by placing our ships of war off those ports to seize any vessel attempting to enter, for breach of our revenue laws, and condemning such ships as forfeited, under the act closing such ports, in such courts as the act should prescribe. Other powers could not take exception to such a measure, since it is the undoubted right of a nation to close any of its ports against external commerce, and to forfeit any ship attempting to commit a breach of the revenue laws, *(Story on Const.*, sec. 1290.*)* England certainly could not complain of it, because she enforced a similar measure against us in 1776.

It may, perhaps, be contended that the power to declare and enforce a blockade, under the law of nations, lies in the President, as incidental to his military authority as general in chief of the army and navy of the United States, when in actual service, and to the duty which the Constitution imposes upon him to cause the laws to be executed. Let us not be beguiled into this error, or induced to give the sanction of judicial authority to a principle that must so dangerously subordinate the civil to the military power. Give this loose construction to the guarded language of the Constitution, and you place in the hands of the President a power more stupendous than that wielded by any sovereign of the earth. See how easily that power might be wrested to the incalculable injury of the people! Under the act of 1795 the President has power to call out the whole militia of the United States, not merely to repel actual or attempted invasion, but to provide against, what he may consider, the danger of invasion. *(Story Const.*, 1209.*)* The authority to decide whether the exigency has arisen has been judicially declared to belong exclusively to the President, and his decision to be conclusive on all other persons. *(Story*, 1210.*)* By the Constitution he is general in chief of the army and navy, and, when the militia is called out, of that arm also. If, as commander in chief, he has power to proclaim a general blockade without the authority of Congress, he has but to allege a danger of invasion—a danger of which he is the only judge—to entitle him to place himself at the head of a military force larger than the army of any European power; to declare a general blockade of the entire sea board of some foreign power, with which we are not at open war; and thus declare and initiate a war of aggression, without the authority of Congress. This may be supposed an extreme case; but constitutional propositions must stand the test of extreme cases, or they break down altogether. Could it happen? That is the question. If it could happen, if the assumption or concession of such a power might, or could, however remotely, produce such results, then we may be assured the Constitution never intended that such a power should exist, and never, until these extraordinary times—if even now, indeed—has any one ventured to maintain that such a power does exist under the Constitution.

But where do we find authority for the principle that the commander of an army may declare a *general* blockade of an enemy's country? I can safely defy any one to produce such an authority. There is a wide distinction between the declaration of a "general blockade" of an enemy's entire sea-board, under the law of nations, and the blockade, as an ordinary operation of active hostility, of any one port or place which may be the immediate object of reduction or siege.

A *general* blockade is invariably and necessarily the act of the government—that is to say, of that branch of the government, which, by the particular law or constitution of the belligerent declaring it, is invested with power to declare and enforce such a measure. In England the sovereign exercises the prerogative of declaring war, and the proclamation of the sovereign imposes and enforces a general blockade. So in France; so elsewhere throughout Europe. The sovereign exercises universally that act of high sovereignty which repeated judicial *dicta* have pronounced a blockade to be. In the United States, the sovereign people have by their Constitution expressly reserved this power to themselves, to be exercised only by their representatives in Congress. The right to declare war, and to enforce other belligerent rights, of which *blockade* is one of the most important, lies in Congress, and in Congress alone. The general blockade of an enemy's coast is a measure independent of, and has no necessary connection with, active military operations. It is a measure directed not against the ports themselves, but against the foreign commerce of the blockaded country. The blockade of a single town, or port, by a military or naval commander is an act of active hostility. Such a right is supposed to be expressly delegated to an officer charged with the command of a distant expedition. Sir William Scott, in the case of "*The Rolla*," (6 C., Rob., 366,) held that "a commander, *going out to a distant station*, might reasonably be supposed to carry with him such a portion of *sovereign authority*, delegated to him, as might be necessary to provide *for the exigencies of the service on which he was employed*. On stations in Europe, where government was almost at hand to superintend and direct the course of operations, under which it might be expedient that particular hostilities should be carried on, it might be different, but in distant parts of the world it could not be disputed, he conceived, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, *for the more immediate purpose of reduction*." This blockade—if blockade it can be called—is proclaimed, not from a distant station, or by the commander of a distant expedition, and for the immediate reduction of a besieged port, or fortress, but from the very seat of executive government. It is, in fact, as appears on its face, a civil act of the executive made by the President, *as President*, and countersigned by the Secretary of State; and if it cannot—as I maintain it cannot, especially in the face of the express provisions of the act of 13th July, 1861—be maintained and justified in that point of view, it cannot be maintained at all.

But admitting, for the sake of argument, that the President, as commander in chief of the forces, in order to suppress this

insurrection, has power to close the ports of the insurrectionary States against all commerce, whether foreign or domestic; he has this power in virtue of municipal law, and not in virtue of the law of nations. He does not possess it by right of war, for there is no war, and rebels are not enemies. (Chenowith's case, above cited.) What, then, would be the penalty for the violation of this military prohibition? It is a fundamental principle that there is no penalty for the violation of a municipal prohibition, save that which the municipal law itself prescribes. What prescribed penalty is there in this case for such violation? You must look to the municipal law for it. You cannot look to one code for your prohibition, and to another for your penalty—especially if it is clear that the other code does not in any way apply to the case. It is clear, therefore, that if the President had power to close these ports, as a military commander, he has not the power to exact a penalty for the violation of his commands—still less to constitute a capture made for such violation a Prize of war.

The President, in the first instance, as a measure which, whether legal or not, he considered himself called upon by public opinion to adopt, until Congress should meet and deliberate upon the subject, saw fit to declare a general blockade of the insurrectionary States "*under the laws of the United States, and the law of nations.*" (*Message to Congress, 4 July, 1861.*)

As a question of law it may be affirmed that a general blockade could not be enforced under the laws of the United States, and, *at the same time*, under the law of nations.

A blockade under the laws of the United States—as, for instance, under section 4 of the act of 13th July, 1861—would be a revenue measure simply, not cognizable by the law of nations. A blockade under the law of nations would be regulated wholly by international law, and could have no relation to the laws of the United States.

It is not surprising that a blockade so anomalous in its nature should have carried with it in its course a train of inconsistencies.

On the 12th May, 1862, the President issued a proclamation by which, "pursuant to the authority vested in him by the 5th section of the act of the 13th July, 1861," he declared the blockade of certain ports named in the Proclamation of the 19th April, 1861, to have ceased, and that intercourse might be renewed with those ports under certain conditions.

This proclamation professed to withdraw the blockade under the authority of the *fifth* section of the act of 13th July, 1861—a section which has no reference whatever to the closing of the ports of entry.

The *fourth* (not the fifth) section of that act authorized the President to close the ports of entry of the insurrectionary States by Proclamation, and provided that "thereupon all right of importation, warehousing, and other privileges incident to ports of entry, should cease and be discontinued at such ports *so* closed—(that is, closed by Proclamation of the President to be issued under authority of that section)—*until opened by the order of the President* on the cessation of obstructions.

But, until the President had made the Proclamation authorized

by the first part of the 4th section, the ports of the Southern States were not closed at all as ports of entry *under the terms of that act;* and unless they were closed under that act, the authority to re-open the ports "*so* closed" could have no operation.

No such proclamation has been issued, and yet the President, while still claiming that the ports are blockaded, not under the terms of the act of 13th July, 1861, but under his proclamation of 19th April, 1861, professes to have withdrawn the blockade, of the ports specified, *under the authority of the act.* In other words, he claims to have blockaded the ports under the law of nations, and to have re-opened the ports under the provisions of a revenue act.

Those ports, however, have never been lawfully closed as ports of entry under the act of 13th July, 1861, or under any other revenue act of the United States; and therefore the Proclamation of 12th May, 1862, which professes to re-open them under the authority of an inapplicable section of the same act, only illustrates the depth of error into which the irregular and unconstitutional Proclamation of the 19th April, 1861, has plunged the executive. If the President had power *to declare* a blockade under the law of nations, without the authority of Congress, he clearly would possess the power *to withdraw it*, without falling back upon the section of an act, to which he had studiously avoided giving effect.

That he should be obliged to borrow the authority of that act to enable him to re-open the ports, with some appearance of constitutional authority, shows that, without the authority of Congress, he could have had no power to close them at all.

I assert, then, that the altered nationality of the "Nassau," supposing it to be genuine and *bona fide*, and not merely colorable, as there is just ground for believing, does not in any manner affect the question. Assuredly, it cannot affect our lien, because any transfer of ownership can only have taken place subject to all liens affecting her at the date of sale.

In any case, the law of prize does not apply; and therefore we may dismiss from view the array of cases which go to deny a *locus standi* in a Prize Court to a material man under the hard rules of international law.

But, for the sake of argument, we will suppose war to exist, in the full sense in which it is understood by the law of nations. Will this Court still be forced, by the example of precedent, to deny us the rights to which Justice and Equity, and the protective Theory of government entitle us? It will be well for us to consider the able views of another judge respecting the force of precedent in a case so exceptional.

Under the Prohibitory Act of 1776, all intercourse between Great Britain and the revolted colonies was, as we have seen, prohibited, and the property of the inhabitants, without exception, was declared confiscated and liable to condemnation by a Prize Court on capture. Some colonists, professing to fly from the penalties of the act of Congress, known as the Abjuration Act, sailed for England in an American vessel, which they had bought for the purpose. That vessel was captured, and taken to the Prize Court for condemnation, under the act we have been considering. By the strict letter of the act—

by a long array of precedent—she was clearly liable to forfeiture; but what said the Judge? "The precedents quoted," said Sir James Marriott, *(The Rebecca.* 1 Hay & Marriott, 197,*)* "show plainly that there are cases out of the view of the Prohibitory Act. I hear of precedents with pain, as well as this audience, when it is recollected by whom these precedents were made. The utmost respect is to be paid to great names, but I must judge in every case for myself, according to my own conviction and ideas. It is easy to decide, when an Act of Parliament marks the line by which a court is mechanically to be guided. When there is no act of the Legislature, or where it does not extend to the subject in dispute, His Majesty's commission directs the Judge of this Court to proceed in a summary manner, and according to the equity of the case. The late Judge, in the cases of Governor Bull, Angus Macauley, Milligan, Carne, and Savage, said *he would be bound by no precedents;* I say the same."

So, in this case, I ask your Honor to consider the equities. I ask you to throw aside the trammels of precedents which do not apply, and, as this is a new and exceptional case, at least in our country, to deal with our case in the exceptional manner that justice and equity prescribe. What are the circumstances? The Nassau, or, as she may be more accurately called, "the Gordon," is, or was, when our claim was contracted, an American ship, registered in an American port, and owned by American citizens. Unless the alleged transfer of her to foreign owners shall be shown to have been a *bono fide* one, she is still owned by individuals who, in contemplation of law, notwithstanding their rebellion, are citizens of the United States, owing allegiance to the Federal government. Our libel states that sometime in the month of July, 1860, the "Gordon" entered the port of Wilmington, in the State of Delaware, in a disabled condition. Application was made to my clients, who were material men doing business at Wilmington, to undertake such repairs to the ship and her machinery as would enable her to prosecute her voyage, and this my clients did. The owners of the "Gordon" were resident in another State, having no credit in that port, and were personally unknown to them, but they knew that by the laws of the United States the debt contracted for repairs and materials constituted a general lien on the ship, and it was upon the security of that lien, and in the confidence that the Federal courts would at any time enforce it against the vessel, that they undertook the costly repairs and outfit which the condition of "the Gordon" rendered necessary. Thus repaired at the expense of my clients, "the Gordon" sailed out of Wilmington, and never returned. Then came secession, and with it the impossibility of reaching the ship, owing to the fact that the authority of the Federal courts was paralyzed and suspended in the seceding States. Of the subsequent history of "the Gordon" we know nothing. What we do know is, that the libellants in this case have never had any control over her, and are innocent of any employment of her, should she ever have been so employed, hostile to the interests of the government. Well, in the month of June last, Messrs. Harlan, Hollingsworth, & Co., learn that "the Gordon," under what we suppose to be the assumed name of "the Nassau," had arrived at the port of New York, and they instruct me to libel her

for the balance of their claim, in this court. I do this, and now we are told that because the ship was brought into port by a public vessel of the United States, the lien that attached to her under the maritime law is forfeited and lost. Why, if this be so, what are the advantages of loyalty? The seceding States hastened to inflict punishment on loyalty by peremptorily forbidding the payment of any debt due to Northern creditors. That at least was natural. There was some excuse for it, in the passion of political antagonism. Is the same penalty to be meted out by the Constitutional courts of the country, under the fiction—for it is nothing more—that a rebel ship becomes, on capture by a national vessel, a Prize of *war*, and, *ipso facto*, discharged of its debts to loyal citizens? I confess I know no law by which so arbitrary, so unrighteous, a doctrine can be supported. Why, sir, the public ships of the United States are the common property of the citizens. The government itself is part and parcel of the people. As loyal citizens, the libellants in this case were entitled to claim the aid of government, and of the naval power, for the purpose of enforcing their claim against a ship owned by other citizens in rebellion against the Federal power. I hold it to be the highest duty of government to afford such aid, if called upon. Can any parallel be drawn between such a case as this, and the reported cases, all of which refer to the ships of a foreign country captured in open war? In the case of an alien ship, a material man, in making advances on the security of a maritime lien, is said to take the security subject to all the chances incident to it, and, among the rest, the chances of an ordinary war. Sir William Scott, in the case of "*The Tobago*," 5 C., Rob. 222, gives this as one material ground of an adverse decision. But whatever may be the chances to which a material man's lien may be supposed to be subject in the case of a *domestic* vessel, the chances of war are certainly not among them. What chance of war could reasonably have been supposed to exist, when the material man was an American citizen, and the ship a domestic ship, amenable to the jurisdiction of our own courts? The existence of such a war would have been a legal impossibility. But even in the case of a ship, the property of an alien enemy at open war with the country of the captor, the rule that capture as Prize of war overrides all private liens is not universal. The principle is that the captor takes *cum onere*, and although the extent of *onus* was, at periods more remote, somewhat restricted, yet, like many other rules connected with prize rights, it would seem to have received a more liberal interpretation under modern jurisprudence. The old rule has been quoted with considerable modification, *in favor of claimants of the country of the captor*. "Cases," said Lord Stowell, in "*The Belvidere*," (1 Dod., 356,) "have been stated, in which the court has certainly attended to claims somewhat similar;" but, in all those cases, the parties had some certain evidence of their right. *They had either a positive lien on the ship*, or some specific security." So in this case we claim a positive lien on the ship under the general maritime law of the United States.

In the *Vrow Sarah*, (cited in note to last case,) a lien for repairs was allowed.

In the case of "*the Aina*," captured during the last Russian war,

Sir Stephen Lushington, in dismissing a claim for lien preferred *on behalf of an alien having a Russian domicile*, said :—" It is a very different question whether lenity should be shown to British merchants, when the captured vessel had been lying in a British port, where they had had transactions in the way of business with it ; and whether, as in cases of this kind, the court should allow *an alien* to put in a claim to defeat the right of the captors, by upholding a claim in the nature of a mortgage on an enemy's vessel." *(The Aina*, 28, Eng. Law & Eq., 600.*)*

The equity and the justice that would view with lenity the lien of the subject of the government of the captor against the ship of an alien enemy, captured during ordinary war, should prevail infinitely *à fortiori*, in favor of a loyal citizen as against the property of *another citizen*, who is a specialty debtor, in rebellion against the government.

In the case of *the Constantia*, (Edw., 232,) Sir William Scott, in granting a claim of a neutral ship for freight on enemy's goods, said : "The crown is bound to take *cum onere*, although not *cum onere universali ;* and as the owners of the ship and cargo were entitled to set off against each other all deductions arising out of the immediate transaction, the crown, *which succeeds to the right of the neutral master exactly in that proportion in which he would have possessed them*, in accepting those rights, is bound to make such deductions as the Danish master would have allowed, if he had continued neutral."

In "*the Vrow Henrica*, (4 C. Rob., 343,) Sir Wm. Scott allowed a claim for freight on enemy property in preference even to the captor's expenses, on the ground that the captor took *cum onere*, and that freight was a lien, which, in ordinary cases, took the place of all others.

I have quoted these cases, not because I consider them applicable to the present case—for I maintain that no case, adjudicated as Prize of war under the general law of nations, can apply to or bind the judgment of the court in this case—but in order to show that the rule so broadly contended for in the Prize Court, on the subject of liens, is not universal. The present case is clearly exceptional. There are no cases in the books which assimilate with it, but the class of cases to which I have referred as having been decided in the British Admiralty during the Revolution, the proceedings as well as the judgments in which were regulated and governed, not by the law of nations, but entirely by the terms of the Prohibitory act. The questions then that arise on the present occasion are these : the court is asked to dismiss the libellant's suit from the Instance side of the Admiralty, because a suit in the Prize Court of the Admiralty is supposed to override it ; but before the court can safely grant such an application, it must be satisfied that the Court of Prize possesses jurisdiction to deal with a rebel ship, or with a ship owned by subjects of a foreign power at peace with the United States, endeavoring to enter a port of the United States, at present held by rebel citizens. Unless the court is satisfied on that point, it will not do us the great wrong to dismiss us, who, apart from the supposed controlling jurisdiction of the Prize Court, are undeniably

recti in curia upon these records. What would be the effect of dismissing us now, in case it should be hereafter found that the Prize Court, which is a court of the law of nations only, has no jurisdiction, under the act of 13th July, 1861, nor under any other law, to condemn a rebel ship, and if not a rebel ship, then, *à fortiori*, not a ship owned by aliens engaged in giving assistance to rebels?

There is another class of cases which are to be found in our own books, and which it may be well to refer to, inasmuch as they tend, in some measure, to direct the Court to a solution of the present difficulty. I allude to the cases decided in our admiralty during the Revolutionary struggle between Spain and her South American colonies. In that contest the government of the United States, as England and France have done in our's, recognized a condition of civil war to exist between Spain and her revolted colonies, and adopted a strict neutrality between the belligerents; but Spain held her revolted citizens, as we now maintain the citizens of the Southern Confederation, to be rebels and traitors.

In the case of the *Divina Pastora*, (4 Cond. Rep., 388, 4 Wheaton, 52,) these relative positions are well defined. The representative of Spain claimed the restitution of the vessel on the ground that she was the property of a Spanish subject, and had been captured on the high seas by a vessel commissioned by a pretended authority called "The United Provinces of Rio de la Plata," contrary to the lawful rights of the subjects of the king; that the said provinces of Rio de la Plata were and had been for a long course of years provinces and colonies of successive kings of Spain; and that the people, persons, and inhabitants dwelling therein had been, and *still were*, Spanish subjects, owing allegiance and fidelity to his said majesty; and that the persons who assumed the right to commission vessels to wage war against his majesty had no lawful authority to do so; and that such acts constituted, in fact, acts of piracy.

In answer to this, the court said that they were not in a position to judge between the king of Spain and his revolted subjects; that the government of the United States had recognized a condition of civil war as existing between Spain and her colonies, and had announced a strict neutrality; and that, therefore, the courts of the Union were bound to consider those acts lawful which war authorized.

In the *Nuestra Senora de la Caridad*, (4 Cond. Rep., 517, 4 Wheat., 497,) the court said, that "civil war having been recognized to exist between Spain and her colonies by the government of the United States, when a capture was made by either of the belligerent parties, without any violation of our neutrality, and the captured prize was brought innocently within our jurisdiction, it was the duty of the courts of the United States to leave things in the same state they found them, or to restore them to the state from which they may have been forcibly removed by the act of our own citizens."

Exactly the same principles were held in the *Josefa Segunda*, (4 Cond. Rep., 678, 5 Wheat., 338.)

In the case of *The United States v. Palmer*, (4 Cond. Rep., 350, 3 Wheaton, 610,) the principles that should govern the courts of the United States in such cases were thus stated:

"When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government *as it is viewed by the legislative and executive departments of the government of the United States.* If the government of the Union remains neutral, but recognizes the existence of civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against the enemy."

It is not, therefore, upon any recognized principles of public law that the courts of the Union have proceeded in dealing with questions arising out of the revolutionary contests of foreign States or countries. They have been guided wholly by the position assumed in respect to such States by our government and Congress. When government and Congress have recognized the domestic relations of a foreign power with its own citizens to be those of civil war, and have assumed a strict neutrality between the belligerents, the courts have declined to interfere as between the revolted citizens and their supposed sovereign.

The struggle now occurring on this continent has been recognized by certain foreign countries, as that between Spain and her Colonies was by the United States in 1816, as amounting to civil war, and an attitude of neutrality has been assumed by those governments towards ourselves as belligerents, as was the case with our government then. But what do we say—what do our government and Congress say, on the subject? They say, as Spain said on the records of our Admiralty in the case of "*the Divina Pastora,*" that there is but one government within the territory of the United States, and that government is established at Washington. They deny that the conspiracy, now armed against our Union in the South, amounts to more than a formidable act of rebellion. They insist, and rightly insist, that the persons who are in arms against the government, are still citizens of the United States, and that it is to bring these back to their allegiance that the military power of the government is being employed.

We have only to peruse the official dispatches of the Secretary of State to our ministers at foreign courts, to be assured of the extent to which our government repudiates the existence of war, in the sense in which it is understood under the provisions of international law.

And as regards Congress: if *war* existed between the United States and a foreign nation, why pass an act of "*confiscation,*" such as has just received the assent of the President? Is that an act of war contemplated by the provisions of international law, or is it simply a punitory act directed against citizens acting the part of traitors? The title of that act, "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," &c., defines at once and forever the relations between the government and its revolted citizens as being those of rebellion, and nothing less or more.

The courts have to deal with the question now not as the judiciary of a neutral, but in the same relation to the other belligerent as

Spain occupied in the case of the *Divina Pastora*. It is safe for the courts to be guided in this case, as they were in that, by the attitude preserved by the government and Congress in relation to the present contest. If the government and Congress had treated the Southern Confederation as an independent government, capable of declaring war against this country, then this Court might have held the *Nassau* to be strictly Prize of war, subject to the jurisdiction of a Prize Court. If the government and Congress, on the other hand, have refused to recognize any such right in the South, but have asserted the pretended independence of the South to be nothing less than organized rebellion, then, sir, this court cannot, on the authority of the Spanish American cases, deal with this, or any similar case, as Prize of war. How, then, can the suit in the Prize Court be held to oust the jurisdiction of this court to enforce the lien claimed by us *in rem* against the ship now in court? And will the court, under such circumstances, go the length of dismissing our suit without a hearing before the question of jurisdiction can be said properly to have arisen in the Prize Court?

If ever there was a case in which equity should supersede precedent, however apposite, this is that case. Admit the "Nassau" to be, in the widest sense of the term, a "Prize of war," and the right to confiscate her, as the property of rebels, or of confederates of rebels, undeniable, yet justice, and equity, and reason—aye, and law, which has been said to be the perfection of reason—forbid that more of her should be confiscated than belongs to rebels, or their abettors. On what principle of justice, of equity, or of law, could it be argued, or judicially affirmed, that the treason of the owners of "*the Gordon*" operated as a confiscation of the money of loyal citizens incorporated in her, as she stood when captured? On what principle shall it be held that because the present or late owners of "*the Gordon*" are themselves rebels, and have used their ship to aid the rebel cause against the Federal government, therefore loyal citizens, belonging to a State that has never seceded, who have had neither act nor part in such treason, shall be punished for the crime of others, when they possess a claim which under the law of the United States would override even the rights of ownership? This case stands independently of precedent. It is a case that, apart from the strong legal considerations to which I have directed attention, appeals powerfully to the equity of the court. Sir James Marriott, in the case of "*the Rebecca*," already quoted, in dealing with a question of strong analogies, cast precedent to the winds, and on restoring a vessel, which, by the strict letter of the Prohibitory act, was undoubtedly liable to forfeiture, he said: "If I am mistaken, I shall be happy in the error; and I can only refer, so far as regards this court and my own opinion, to the expression and feelings of the old Roman:

"'Si pugnent sententiæ, valeat mitior.'"—"When opposite opinions are equal, humanity should prevail."

On the same principle, I cannot doubt that in this case equity will prevail, and that your Honor will not dismiss our suit without a hearing, on grounds so very questionable.